



July 20, 2001

Mr. Jerome H. Supple
President
Southwest Texas State University
601 University Drive
San Marcos, Texas 78666-4615

OR2001-3167

Dear Mr. Supple:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149674.

Southwest Texas State University (the "university") received a request for all forms of communications between specified university employees and all investigation notes related to a particular sexual harassment claim. You state that you have released some of the responsive information. You also state that no records exist which reflect any communications between two of the specified university employees.¹ You claim, however, that the submitted information that you have not released is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information. We have also considered comments submitted by an interested third party. *See Gov't Code § 552.304* (providing that interested party may make comments stating why information should or should not be released).

You claim that the submitted information related to communications between specified university employees is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

¹ It is implicit in several provisions of the Public Information Act ("Act") that the Act applies only to information already in existence. *See Gov't Code §§ 552.002, .021, .227, .351.*

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. The university has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The university must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that the requestor filed suit against the chair of the university's Department of Biology on January 10, 2001. Therefore, based on your representation and on our review of the submitted information, we conclude that you have demonstrated that the university is involved in pending litigation. We also find that you have adequately explained how the submitted information pertaining to communications between specified university employees relates to the subject matter of the pending litigation.² Therefore, most of this information which we have marked is excepted from disclosure pursuant to section 552.103 of the Government Code. However, it appears that a small portion of this information has already been seen by the requestor. *See* Open Records Decision Nos. 349 (1982), 320 (1982) (stating that no section 552.103 interest exists with respect to information seen by or obtained by all parties to litigation through discovery or otherwise). Accordingly, you may not withhold the unmarked information from the requestor.

² Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You claim that the submitted investigation notes are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy.³ Information is protected by common law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The submitted information concerns allegations of sexual harassment by a university employee. Although information relating to an internal investigation of sexual harassment claims involving public employees may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the details of such an investigation. See Open Records Decision Nos. 444 (1986), 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). However, the identifying information of victims and witnesses to alleged sexual harassment is protected by the doctrine of common law privacy and must be withheld from disclosure. See *Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.--El Paso 1992, writ denied). In this instance, however, the alleged victim of the sexual harassment is the requestor. Therefore, you may not withhold the victim's identifying information from disclosure. See Gov't Code § 552.023 (providing that individual has limited special right of access to information when only basis for excepting information from disclosure involves protection of same individual's privacy interest); see also Open Records Decision No. 481 (1987). Accordingly, you must withhold from disclosure the identifying information of all witnesses of the alleged sexual harassment listed within the investigation notes.⁴

However, to the extent that the submitted investigation notes contain identifying information of students who are not witnesses to the alleged sexual harassment, we address section 552.114 of the Government Code in conjunction with the Family Educational Rights and Privacy Act of 1974 ("FERPA"). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information

³ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses the common law right to privacy.

⁴ We note that if you receive another request for this information from someone other than the requestor or the requestor's authorized representative, you should seek another decision from this office regarding the public nature of the information.

directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *See id.* § 1232g(a)(4)(A). Information must be withheld from disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” *See* Open Records Decision Nos. 332 (1982), 206 (1978), 224 (1979) (student’s handwritten comments that would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). Accordingly, you must withhold from disclosure the identifying information of all students listed within the investigation notes.

In summary, you may withhold the marked information relating to communications between specified university employees pursuant to section 552.103 of the Government Code. You must withhold from disclosure the identifying information of all witnesses of the alleged sexual harassment listed within the investigation notes pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy. You must withhold from disclosure all identifying information of all students listed within the investigation notes pursuant to section 552.114 of the Government Code in conjunction with FERPA. You must release all remaining information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

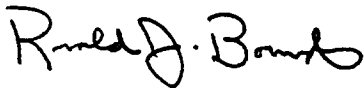
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 149674

Enc: Marked documents

c: Mr. Randy Stephens
350 North Guadalupe 140-265
San Marcos, Texas 78666
(w/o enclosures)